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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/233,443	01/20/1999	BERNHARD H. VAN LINGERICH	BVL-105	7428

7590 03/17/2003

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EXAMINER

WEBMAN, EDWARD J

ART UNIT	PAPER NUMBER
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1617

DATE MAILED: 03/17/2003

83

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/233493

Applicant(s)

VAN LONGBACH

Examiner

WGBMAN

Group Art Unit

16.7

—The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address—

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

## Status

- ☒ Responsive to communication(s) filed on 11/26/02.
- ☒ This action is **FINAL**.
- ☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

## Disposition of Claims

- ☒ Claim(s) 1-58, 61-106 is/are pending in the application.
- Of the above claim(s) 1-20, 23-25, 27, 28, 30-46, 53, 56, 58, 61-65, 68-95, 98, 100 is/are withdrawn from consideration.
- ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- ☒ Claim(s) 21, 22, 26, 29, 47-52, 54-55, 57, 66-67, 96, 97, 99, 101-106 is/are rejected.
- ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- ☐ Claim(s) \_\_\_\_\_ are subject to restriction or election requirement.

## Application Papers

- ☐ See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.
- ☐ The proposed drawing correction, filed on \_\_\_\_\_ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
  - ☐ All ☐ Some\* ☐ None of the CERTIFIED copies of the priority documents have been received.
  - ☐ received in Application No. (Series Code/Serial Number) \_\_\_\_\_.
  - ☐ received in this national stage application from the International Bureau (PCT Rule 1.7.2(a)).

\*Certified copies not received: \_\_\_\_\_

## Attachment(s)

- ☒ Information Disclosure Statement(s), PTO-1449, Paper No(s) 32
- ☒ Notice of Reference(s) Cited, PTO-892
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948
- ☐ Interview Summary, PTO-413
- ☐ Notice of Informal Patent Application, PTO-152
- ☐ Other \_\_\_\_\_

Office Action Summary

Applicant's election of fat in Paper No. 31 is acknowledged. Because applicant did not distinctly and specifically point out the any errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)).

The election of species requirement over hydrophobic agents is withdrawn.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 21, 22, 26, 29, 47-52, 54-55, 57, 66-67, 96, 97, 99, 101-106 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lim et al in view of Cavaliere Vesely et al.

Lim et al teaches extruded articles comprising cereal grain (abstract), 30-100% is specified (column 3, line 55). Durum wheat is disclosed (column 3, line 43) at 60-90% (column 8, line 37). Extrusion without heating is specified (column 8, lines 45-47); Pellets are specified (column 8, lines 47). Drugs are disclosed (column 9, line 14). Up to 50% poly (vinyl acetate) is specified (column 6 lines 31-32, 37, 40-41). Oil is disclosed (column 6, line 19).

Cavaliere Vesely et al teach Lactobacilli in dietary and pharmaceutical compositions (Title, abstract). Capsules are specified (column 3 line 21).

It would be obvious to one of ordinary skill to encapsulate Lactobacilli in the composition of Lim et al to achieve the beneficial effect of a pharmaceutical.

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Applicants argue that Lim et al does not teach substantially homogenous mixtures. However it is argued the combining the various components of the Lim et al composition will achieve the claimed homogeneity.

As to the claimed control of release, such is merely an intended use.

Claims 21, 22, 47-52, 54, 66, 67, 96, 97, 99, 101-106 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claims 21, 66, 67, 101, 104 "substantially" is vague. It can mean as much as 49%. E.W. Bliss v. Cold Metal Process Co. (DC N OHIO) 122 USPQ 238.

Applicants cite case law but are silent regarding that cited by the examiner.

As to the propriety of the third restriction requirement, applicant's statement that the encapsulated product does not lose its identity is merely opinion. Regarding claim 98, applicants, in the election, paper # 31, filed 12/16/02, assert that "Probiotic" refers to a microorganism. However, the term simply refers to commensal organisms, which are not necessarily microbiotic.

No claims allowed.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within

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TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

This application contains claims 1-20, 28, 30-46, 61-65 is drawn to an invention nonelected with traverse in Paper No. 11, filed 10/26/00 and paper #15, filed 3/28/81. A complete reply to the final rejection must include cancellation of nonelected claims or other appropriate action (37 CFR 1.144) See MPEP § 821.01.

Applicants are advised that the prior art cited with IDSs, paper # 27, filed 7/25/02 and paper #25, filed 3/22/02, are not of record.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Edward Webman whose telephone number is (703) 308-4432. The examiner can normally be reached on Monday to Friday 9 Am 5 PM.

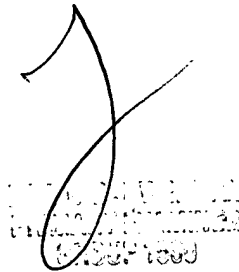
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, S. Padmanabhan can be reached on (703) 305-1877. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 305-3592 for regular communications and (703) 305-3592 for After Final communications.

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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.

Webman/LR  
February 26, 2003

A handwritten signature, possibly "J. [unclear]", is written over a faint rectangular stamp. The stamp contains the text "RECEIVED", "FEB 26 2003", and "09/233,443".